IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil No. 51-353

NATIONAL FURNITURE TRAFFIC CONFERENCE, INC., PLAINTIFF-APPELLANT,

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE AND INTERSTATE COMMERCE COMMISSION, DEFENDANT-APPELLEE

MOTION TO AFFIRM

[Filed November 23, 1951]

Pursuant to Rules 7, paragraph 4, and 12, paragraph 3 of the Revised Rules of the Supreme Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the District Court be affirmed.

This is a direct appeal from the final judgment, entered on September 11, 1951, of a specially constituted three-judge United States District Court pursuant to 28 U.S.C. 1253, 2284 and 2325, denying a motion for summary judgment and dismissing a complaint to set aside orders of the Interstate Commerce Commission. Appeal was allowed

and appeal papers were served on November 9, 1951.

The orders of the Commission complained of were entered in three Investigation and Suspension proceedings under Section 15 (7) of the Interstate Commerce Act, 49 U.S.C. 15 (7).[1] The proceedings began with the suspension, under Section 15 (7), by Division 3 of the Commission, of tariff schedules filed by railroads in Official Territory in June 1949 to become effective on July 15, 1949. These schedules authorized the concellation of exceptions ratings[2] on furniture and related articles shipped by railroads in less-than-carload quantities from and to points within Official Territory and Illinois Territory, and between each of those territories and other classification territories.[3] If it had not been for their

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[1] 279 I.C.C. 509. The proceedings were entitled I & S Docket No. 5677—Furniture, L.C.L., From, to and Between the East; I & S Docket No. 5694—Furniture, L.C.L., From or to Illinois Territory; and I & S, Docket No. 5832—Furniture, L.C.L., From or to Illinois Territory.

[2] The distinction between class rates and exceptions rates is described in the opinion of this Court in *New York* v. *United States*, 331 U.S. 284, 291, n. 4, and in the opinion of the court below.

[3] Classification territories in the United States are as follows: Official Territory may be said roughly to include that part of the United States north of the Potomac and Ohio rivers and east of the Mississippi River. Illinois Territory, as the names indicates, lies largely within the State of Illinois. Southern Territory, generally, lies south of the Ohio and Potomac rivers and east of the Mississippi River. Western Territory, generally, includes that part of the United States west of the Mississippi River.

suspension, existing classification ratings would have become effective on this traffic July 15, 1949. The classification ratings provide higher rates on 151 of the items of less-than-carload furniture and related articles than were provided by the exceptions ratings. The total number of items of furniture and related articles covered by the classification ratings in question are 367.[4]

The order here involved is that of Division 3 of the Commission, which vacated the suspension of these schedules and thus caused the classification ratings and higher class rates to apply to 151 of the 367 items of less-than-carload furniture and related articles referred to above.[5] The reasoning of Division 3 in arriving at the challenged order is fully set forth in its report, which is attached to the jurisdictional statement as Appendix A. Appellant charged in its complaint that classification ratings were unreasonable in violation of 49 U.S.C. 1 (5), were unduly discriminatory in violation of 49 U.S.C. 2 and were unduly prejudicial to shippers and areas in Official and Illinois territories and unduly preferential of shippers and areas in

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[4] "Related articles" largely include children's vehicles, such as velocipedes and doll carriages, baby carriages, clothes' hampers and store display racks. Railroads operating in other than Official and Illinois territories did not file tariffs authorizing the cancellation of the exceptions ratings.

[5] The second order complained of in the district court was that of the full Commission denying the petition of appellant for reconsideration of and rehearing on the first order. Error is not assigned to the refusal of the district court to set aside this order.

other classification territories, in violation of 49 U.S.C. 3 (1). The charge that classification ratings were unreasonable was largely based upon the contention that the rates provided were unduly high. The charge that these ratings were unduly discriminatory was based upon the contention that items of furniture having the same transportation characteristics and then moving on the same rates would, under the classification ratings, be assigned different rates. The charge that the classification ratings would be unduly prejudicial to shippers and areas in Official and Illinois territories and unduly preferential in favor of shippers and areas in other classification territories was based on the failure of railroads in Southern and Western territories to publish or concur in tariff schedules authorizing the cancellation of the exceptions ratings.

Appellant now assigns as error the district court's findings, conclusions and rulings that the ultimate finding of Division 3 of the Commission that the classification ratings are just and reasonable and not otherwise unlawful, was adequately supported by subordinate findings and by substantial evidence. In its statement as to the substantiality of the questions presented, appellant broadly charges that the court below has abdicated its function of judicial review, and stresses the importance of the furniture industry and the im-

portance of the rates here involved to that industry.

We submit that the judgment of the district court is well considered and correct. It was entered in a proceeding to review the order of an administrative body in a specialized and technical matter entrusted to that body by Congress. The Commission is expected to bring to matters before it the benefit of its experience, special knowledge and informed judgment. This is the heart of the administrative function in the quasi-legislative process of railroad rate making. *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 536. The Commission must, of course, act within the Constitution and its statutory authority. It must hold full and fair hearings; its orders must adequately explain the basis for its conclusions so that interested parties and reviewing courts may know why it acted as it did; its conclusions must have rational and substantial support; and it may not act capriciously or arbitrarily. But within those bounds, all findings of fact and all conclusions on mixed matters of law and fact are to be finally made by the Commission. *Interstate Commerce Commission* v. *Union Pacific Railroad Company*, 222 U.S. 541, 547-8. In reviewing an administrative order, the court may not properly be asked to rehear the matter or to substitute its judgment for that of the Commission. The court may not be asked to reach its own conclusion on the issue pre-

sented to the Commission. The "judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Hanna Furnace Corp.* v. *United States*, 53 F. Supp. 341, affirmed 323 U.S. 607; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286. This is the meaning and substance of the doctrine of administrative finality. The importance of the industry or the rates involved obviously does not require a different standard of review to be applied to the decision of the expert administrative body charged with rate making.

The rule of administrative finality has peculiar application to decisions of the Commission under 49 U.S.C. 1 (5), 2 and 3 (1). It was so held in *Board of Trade of Kansas City* v. *United States*, *supra*, at page 546:

> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission * * * and upon which its decisions, made the basis of administrative orders operating *in futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power." *Manufacturers Ry. Co.* v. *United States*, 246 U.S. 457, 481; see *Nashville, C. & St. L. Ry.* v. *Tennessee*, 262

U.S. 318, 322; *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 352-53.

> The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems. Cf. *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U.S. 573, 581-82.

Appellant had full access to and the full benefit of the administrative process provided by law. The Commission was not required by 49 U.S.C. 15 (7) to suspend the tariff schedules filed by railroads in Official Territory. It exercised its discretion in doing so. Thereafter, the Commission initiated and conducted a full investigation, and conducted a hearing before an examiner over a four-day period. The transcript of the hearing covers 711 pages and 95 exhibits were offered by the parties. The Hearing Examiner before whom the hearing was held duly made his proposed report and appellant filed extensive exceptions thereto. Division 3 heard argument on these exceptions and, after its decision was rendered and its order was made, appellant petitioned the Commission for further hearing and reconsideration. The Commission heard argument on this petition and

denied it on the ground that no good cause existed for reopening the proceedings for further hearing and reconsideration. As a result of these extended administrative proceedings, the effective date of the suspended schedules were progressively postponed to April 25, 1951. Thus, appellant enjoyed lower rates than those that Division 3 ultimately found were just and reasonable and not otherwise unlawful from July 15, 1949—the date when the suspended schedules would have become effective but for their suspension—to April 25, 1951.[6]

The Commission is not required to make detailed findings of fact except in actions to enforce its orders awarding damages. 49 U.S.C. 14 (1). It is enough that " 'the report read as a whole sufficiently expresses the conclusion of the Commission based upon supporting data' ". *Alabama Great Southern R. Co.* v. *United States*, 340 U.S. 216, 227-228. That the district court applied this

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[6] It is significant that the rates ultimately prescribed are below the maximum basis found reasonable in a general furniture rate investigation from which this proceeding stemmed. *Furniture*, 177 I.C.C. 5. The Commission concluded:

"The exceptions ratings are far below the maximum basis prescribed in *Furniture*, *supra*, and the classification ratings, which would apply in the absence of exceptions ratings, are also substantially lower than the prescribed basis. The evidence relating to costs is not conclusive, but it gives rise to serious doubt as to whether sufficient revenue is derived from the exceptions basis to compensate for the cost of the service. From the evidence before us, we are convinced that the classification ratings proposed will not do more than compensate the respondents for the service performed on this traffic. As stated, the record is not persuasive that the ratings proposed will subject any shippers to undue prejudice."

test to the findings of Division 3 in the instant proceedings is clear. The court said:

> An examination of the Commission's report in the instant case shows that it lived up to the rule. Well over a dozen subsidiary findings were made covering the nature, organization, and extent of the furniture industry; the volume and character of its traffic, and the extent to which it moves by truck, and the average length of haul when so moved and when moved by rail in less than carload lots. Findings also were made with respect to the transportation characteristics of furniture, i.e. its weight, density, value, susceptibility to damage, terminal handling costs, and its desirability generally as traffic. No useful purpose will be served by a detailed recapitulation of all the findings, for they are to be found in the published report of the Commission cited above. It is true that no findings were made with respect to the non-furniture items, such as clothes baskets and children's vehicles, enumerated above, and that no specific findings were made comparing furniture rates with rates on non-related but comparable commodities. But this is not fatal for the reason that it has long been the rule that typical or representative findings resting upon typical or representative evidence are all that is required, otherwise the administrative burden in cases like this would be so great that the Commission would be bogged down in a mass of detail and unable to function. See *New England Divisions Case*, [261] U.S. 184,

> 197 et seq. Certainly to require a full scale comparison of rates on comparable commodities in every rate case would be to require the impossible. Preoccupied as it is with rates, we must assume that in these cases the Commission has the general rate scale in mind for comparative purposes when setting or sanctioning a rate for any particular commodity, even though it may say nothing as to the rate scale at large.

It is likewise apparent that the district court considered the entire record in determining that the subordinate and ultimate findings of Division 3 were adequately supported by the evidence. The court said:

> And it will also suffice to say that a careful examination of the voluminous record before the Commission discloses adequate evidence, although some of it is typical or representative to be sure, to support the subsidiary findings made. To analyse the record in detail and to discuss all of the arguments made with respect to it, would result in an opinion as long as the Book of Deuteronomy and as instructive and palatable reading as the "begat" chapters of the Book of Numbers. We content ourselves therefore with the general statement that a perusal of the record and a consideration of the arguments leaves us with the firm conviction that the Commission has not deviated from the rule stated earlier herein.

Appellant actually adverts to but one question of law in its statement as to substantiality of questions presented. The court below held that:

> if some of the fears of unreasonableness, inequality or prejudice expressed by the shippers materializes, remedial process is readily at hand under the Act.

Appellant asserts that this is error, and that "later collateral attack upon such ratings by an individual shipper would be precluded" citing *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U.S. 370, 381. But that principle is applicable to rates *prescribed* by the Commission, not to carrier proposed rates which the Commission declines to set aside. *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, 685-7. Appellant seeks to distinguish the *Inland Waterways* case on the ground that there the Commission had not found the rates to be just and reasonable and not otherwise unlawful. But this Court's opinion in that case shows the contrary to be the fact. This Court noted that (319 U.S. at 685)

> the Commission stated that the railroads "are justified under section 1 in treating the ex-barge traffic the same as local or ex-truck traffic," and found that "the proposed schedules are shown to be just and reasonable".

and also that the Commission had found that (*id.* at 686) "the proposed schedules 'are not shown to be otherwise unlawful' ". Nevertheless, the Court

held that the Commission's order did not constitute an approval or prescription of the rates involved. And subsequently those rates were in fact set aside in what appellant would regard as a "collateral attack." *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567.

CONCLUSION

For the foregoing reasons, it is evident that this appeal presents no substantial questions. It is therefore respectfully submitted that the judgment of the district court should be affirmed.

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NOVEMBER 1951.

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No. 476

NATIONAL FURNITURE TRAFFIC CONFERENCE, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION OF THE PENNSYLVANIA RAILROAD COMPANY ET AL., TO AFFIRM

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INDEX

Subject Index

	Page
Motion of the Pennsylvania Railroad Company, et al., to affirm	1
Background and nature of the proceedings	3
The questions presented by appellant are unsubstantial	8
The question whether the Commission Orders are invalid because of absence of findings as to rates other than on furniture and as to general rate scales—Assigned Errors 6 and 7	13
The question whether the Commission Orders are invalid because of their effect upon three non-furniture classification items—Assigned Errors, 8, 9 and 10	14
The question whether the Commission admitted in its report that the record was inadequate to permit subsidiary findings sufficient to sustain its ultimate conclusion—Assigned error 14	16
The question whether the Commission Orders are invalid because the Report shows that the wrong rule as to burden of proof was applied—Assigned errors 15 and 16	18
The question whether the Commission Orders are invalid because of the statement of the District Court that remedial process is available to shippers under the Commerce Act—Assigned Error 17	20
The question whether the Orders are invalid because of a failure to make subsidiary findings bridging a "gap" between the findings made and the ultimate conclusion	21
Conclusion	23

Table of Cases Cited

	Page
Alabama Great Southern R. Co. v. *U. S.*, 340 U. S. 216	9
Arizona Grocery Co. v. *A. T. & S. F. R. Co.*, 284 U. S. 370	12
Ayrshire Collieries Corp. v. *U. S.*, 335 U. S. 573	14
Assigned Car Cases, 274 U. S. 564	16
Bananas from Gulf Ports, 109 I.C.C. 211	11
Barringer & Co. v. *U. S.*, 319 U. S. 1	19
Beaumont, S. L. & W. Ry. v. *U. S.*, 282 U. S. 74	16
Board of Trade of Kansas City v. *U. S.*, 314 U. S. 534	9
Class Rate Investigation, 1939, 262 I.C.C. 447	4
Class Rate Investigation, 1939, 264 I.C.C. 41	6
Eastern-Central M. C. Assn. v. *U. S.*, 321 U. S. 194	9
Furniture, L.C.L., from, to and between the East, I. & S. 5677	2
Furniture, L.C.L., from or to Illinois Territory, I. & S. 5694	2
Furniture, L.C.L., from or to Illinois Territory, I. & S. 5832	2
Georgia Commission v. *U. S.*, 283 U. S. 765	16
Interstate Commerce Commission v. *B. & O. R. R.*, 145 U. S. 263	19
Interstate Commerce Commission v. *I. Waterways Corp.*, 319 U. S. 671	11
I. & S. 5811 L.C.L. Exceptions Class Rates—Official Territory (not reported)	7
Increased Freight Rates, 276 I.C.C. 9	10
Increased Less-Than-Carload Rates in Official Territory, 273 I.C.C. 57	7
Less-Than-Carload Exceptions Ratings, Official Territory, 269 I.C.C. 553	7
New England Divisions Case, 261 U. S. 184	16
New York v. *U. S.*, 331 U. S. 284	6
Southern Class Rate Investigation, 100 I.C.C. 513	11
Texas & P.R. Co. v. *U. S.*, 289 U. S. 627	11
Tobacco Merchants Assn's v. *Aberdeen & R. R. Co.*, 181 I.C.C. 199	11

Page

United States v. *Illinois Central R. R.*, 263 U. S. 515 19
United States v. *Louisiana*, 209 U. S. 70 16
United States v. *Pierce Auto Freight Lines*, 327 U. S. 515 10

STATUTES CITED

Interstate Commerce Act:

Section 1 8
Section 2 8
Section 3 8
Section 13 12
Section 14(1) 9
Section 15(1) 10
Section 15(7) 2

United States Code, Title 28:

Section 2284 1
Section 2325 1

1951, appellant made no application to the District Court for a stay of its order of September 11, 1951. The appeal was allowed on November 9, 1951.

The orders of the Interstate Commerce Commission, dated November 20, 1950, and March 16, 1951, were entered in three investigation and suspension proceedings, reported at 279 I. C. C. 509 and entitled "I. & S. 5677—*Furniture, L. C. L., From, to and Between the East;* I. & S. Docket No. 5694—*Furniture, L. C. L., From or to Illinois Territory;* and I. & S. Docket No. 5832—*Furniture, L. C. L., From or to Illinois Territory.*" The Commission proceedings arose out of the action of the principal railroads operating in Official Classification Territory[2] in filing certain tariff schedules in June, 1949, to become effective July 15, 1949. The Commission exercised its discretion under Section 15(7) of 49 U. S. C. A. to suspend the operation of those schedules and to institute an investigation into their lawfulness.

After hearing and submission of briefs, a proposed report was issued by the Hearing Examiner, recommending that the tariff schedules be permitted to become effective. Shipper protestants, including plaintiff-appellant, filed exceptions, which were orally argued before Division 3 of the Commission. The first order attacked by plaintiff is the order of Division 3, issued on November 20, 1950, providing that the suspension of the tariff schedules was vacated as of December 11, 1950, and the investigation discontinued.

Shipper petitions for further hearing and reconsidera-

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[2] In general, Official Classification Territory is that part of the United States lying east of the Mississippi River and north of the Ohio and Potomac Rivers. The railroads which were parties to the tariff schedules, and thus respondents in the Commission proceedings, included practically all railroads operating within that Territory. A few roads operating principally in other territories but to some extent in Official Territory are not parties to the tariff schedules.

tion by the entire Commission having been filed however, the proceedings were reargued before the entire Commission, which on March 16, 1951, issued its order denying the petitions and fixing April 10, 1951, as the date on which the tariffs should become effective.

A temporary restraining order issued by Judge Ford of the District Court on April 17, 1951, was revoked by the court, and plaintiff's application for an interlocutory injunction was denied, by order of May 3, 1951, issued after hearing the parties on affidavit and in oral argument. The tariff schedules accordingly became effective on May 8, 1951, and are presently in effect.

Background and Nature of the Proceedings

The principal facts clearly appear from the Commission's report and the District Court's opinion (Appendices A and C, respectively, to the Statement as to Jurisdiction; page references herein are to the appropriate pages in the Appendices to the printed Statement, rather than in the official Commission and Federal reports).

The tariff schedules before the Commission in this proceeding cancelled all *exceptions ratings* (which, where published, supersede the otherwise applicable classification ratings) on all items of furniture and related articles moving in less-carload service within, to or from Official Territory via the lines of respondent railroads. Such cancellation, when it became effective May 8, 1951, automatically made applicable on every such item the existing *classification rating* published for that particular item, the exceptional treatment having been discontinued by the cancelling tariffs.

The governing rating on any item of freight determines the percentage to be applied to the basic scale of class rates far various distances of haul, in order to ascertain the applicable freight rate per hundredweight on any movement of

that item. If an exceptions rating is published for any item, *it* is the governing rating, even though a considerably higher classification rating for the same item may at the same time be published in the "Classification" proper.

The classification rating of any item is intended to reflect the item's favorable and unfavorable transportation characteristics, or classification elements (cubic density, value per pound, susceptibility to loss or damage, etc.), which have a direct relation to cost and value of rail service. An exceptions rating is not based on the transportation merits or demerits of the item; it is published generally as a means of accomplishing a rail rate reduction in order to compete with motor or water carriers, or for similar reasons persuasive to railroad management in the formation of any exceptional pricing policy. *Class Rate Investigation, 1939*, 262 I. C. C. 447, 476-477, 508, 509. Since exceptions ratings are lower than the classification ratings on the same items, cancellation of the former automatically has the effect of raising the freight rates applicable to the affected items, even though no change occurs in the basic class rate scales or in published classification ratings.

There are—and were in 1949 when this proceeding began—some 367 items of less-carload furniture articles listed in the "Classification." Each of these has its classification rating reflecting its transportation characteristics. But, in 1949, 151 of those 367 items enjoyed reduced rates by reason of then existing exceptions ratings lower than their respective classification ratings. The remaining 216 items enjoyed no such concession—they moved under the same ratings as published for them, based on the characteristics of each item, in the "Classification" proper.[3]

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[3] In revenues, tons and number of shipments, about half the traffic moved under exceptions ratings lower than the comparable classification ratings. (Exhibit 15 before the Commission; Exhibit 1 before the District Court.)

Cancellation of all exceptions ratings therefore caused increased freight charges to be paid on 151 items, but not on the remaining 216. This was not the result of unequal or selective provisions in the tariff schedules effecting the cancellation. It was solely the result of the unequal nature of the exceptions ratings which plaintiff-appellant and other shipper representatives successfully urged upon the railroads in 1932.

The shipper representatives persistently argued in 1932 that reduced freight charges on furniture were essential (1) to prevent extensive traffic diversions from rail to truck transport (not then Federally regulated) and (2) to financially assist the depression-stricken furniture industry and thereby stimulate furniture production, marketing and traffic. For these two reasons the railroads exercised their managerial prerogative of publishing reduced exceptions ratings. When published, and until cancelled, they were always specially "flagged," or identified in the tariffs, as "motor-competitive" reductions.

The exceptions ratings requested by plaintiff-appellant in 1932, and published by the railroads in the same year, were of such pattern that they effected reductions for all items with classification ratings above a certain "line" but conferred no similar concession on any lower-rated items. Those above the line were 151 in number.

In 1933 and again in 1940 the railroads made general downward revisions in the published classification ratings, including those even then superseded by the motor-competitive exceptions ratings. Consequently, the classification ratings are now substantially below the basis of maximum reasonable ratings approved by the Commission in 1931, after a five-year nationwide investigation of furniture rates and ratings, in *Furniture*, 177 I.C.C. 5. Since the tariff schedules here involved became effective on May 8, 1951,

each of the 367 items has been subject to its regular classification rating, thereby restoring for every item a recognition of its classification elements.

The exceptions ratings were first published to expire in one year. The record before the Commission (Tr. 40-48) and the District Court (Exhibit 1) fully reveal the circumstances explaining the success of the furniture interests in holding these reduced competitive ratings year-after-year, even though they were constantly under criticism and their cancellation, or some half-measure, was repeatedly considered.

In the middle 1940s, less-carload deficits became a serious problem, particularly for the railroads in Official Territory. In 1945, in *Class Rate Investigation, 1939*, 264 I.C.C. 41, 66-67, the Commission admonished the railroads to

> "• • • give careful consideration to the rates maintained by them on less-than-carload traffic with a view to making readjustments in ratings or rates, as promptly as possible, which will insure that the rates on such traffic are on a compensatory level. *Traffic moving on exception*, column, and commodity *rates*, as well as pick-up and delivery services accorded less-than-carload traffic, *should be so studied.*" (Emphasis supplied.)

The Supreme Court, affirming the Commission decision, quoted the Commission's finding that less-carload traffic "was not bearing its proper share of the costs of transportation," *New York* v. *United States*, 331 U. S. 284, 333 (1947), with the further comment (p. 336) that

> "The past failure of this traffic, as a whole, to carry its proper share of the costs may well have been *due in large measure to the maintenance of exception and commodity rates.*" (Emphasis supplied.)

Substantial increases in certain depressed l.c.l. ratings and rates within Official Territory were proposed by the

Official Territory roads and approved by the Commission in I. & S. 5505 and 5502, *Less Than Carload Exceptions Ratings, Official Territory*, 269 I.C.C. 553 (1948), and I. & S. 5811, L.C.L. *Exceptions Class Rates—Official Territory* (not reported; the Commission declined to suspend operation of the schedules).

In *Increased Less-Than-Carload Rates in Official Territory*, 273 I.C.C. 57 (1948), the Commission disapproved a blanket increase in all l.c.l. class rates, and further admonished these carriers (p. 112):

> "*In removing the deficit resulting from less-than-carload operation, carriers should survey their less-than-carload rates and make increases where such rates are low and where the traffic can reasonably bear such an upward adjustment.* But we are not convinced on this record that there should be a blanket increase such as is here proposed in the class rates on all less-than-carload traffic." (Emphasis supplied.)

After carefully studying the entire l.c.l. rate structure and further examining the transportation and traffic characteristics of less-carload furniture, the traffic executives of Official Territory railroads concluded that under current cost and competitive conditions, particularly as distinguished from conditions in 1932, a special basis of motor-competitive exceptions ratings on this traffic was an unjustifiable departure from the regular classification basis. Accordingly, in May, 1948, the railroads announced a public hearing on cancellation of the exceptions ratings. The cancelling schedules were finally filed with the Commission in June, 1949.

The Commission suspended operation of the schedules for seven months under Section 15(7) of the Interstate Commerce Act (Title 49, U. S. Code). This exhausted the Commission's suspension power but, to permit time for full

hearing, briefs, the proposed report of the Hearing Examiner, exceptions to the proposed report, oral argument before Division 3 of the Commission, the report of Division 3, the filing of petitions for reconsideration and further hearing, oral argument upon the petitions before the entire Commission, and Commission consideration of the petitions, the railroads voluntarily postponed the operation of the schedules until final Commission order.

In conducting the investigation of the cancelling tariffs under its discretionary powers in Section 15(7), the Commission was presented one controlling issue, not 151 separate issues. This single issue was: Was it "just and reasonable," or unlawful, for the railroad respondents to cancel the special basis of motor-competitive exceptions ratings on all items of less-carload furniture and related articles then enjoying such reduced ratings?

The Questions Presented by Appellant Are Unsubstantial

The assignment of errors is largely general. In only five respects (discussed separately at a later point herein) can the assigned errors be regarded as specific, and in none of these can there be found a substantial or novel question of law meriting the Supreme Court's detailed review of the administrative action in this rate case. A sixth question, more clearly stated in appellant's Statement as to Jurisdiction, is equally unsubstantial in the light of the clear answers available in existing Supreme Court decisions.

Appellant raises no constitutional question, does not contend that the Commission exceeded its statutory authority, and urges no impropriety in the administrative procedure or inadequacy of its opportunity to be heard at all stages of the proceeding. The substance of its argument is only that the Commission improperly applied Sections 1, 2 and 3 of the Interstate Commerce Act in failing to find on the record

that the tariffs involved were unjust and unreasonable, unjustly discriminatory and unduly prejudicial, and that the report of Division 3 of the Commission failed to include subsidiary findings which are legally sufficient to support its ultimate conclusion.

There was not before the Court any substantive question of statutory construction or point of law other than whether the Commission wisely and soundly exercised its administrative judgment in the purely administrative matters presented to it, and whether it recorded with sufficient detail and clarity the basis for its decision. However expressed, the questions now raised by appellant are no more than further efforts to secure a judicial reconsideration and reversal of the basically factual decisions made by the Commission in applying Sections 1, 2 and 3 of the Commerce Act. Every issue before the Commission called for a composite judgment and evaluation of a number of technical transportation facts.

It is well settled that whether rates are unreasonable, unjustly discriminatory or unduly prejudicial in violation of Sections 1, 2 or 3 of the Commerce Act are questions of fact within the exclusive jurisdiction of the Commission, not questions of law for determination by the courts. *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546, 548. It is equally clear that in a case such as this, where damages are not awarded by the Commission, the Commission is required only to file a written report stating its conclusions, together with its decision and order, including "basic" or "quasi-jurisdictional" findings and sufficient explication to enable the parties and a reviewing court to understand with a fair degree of assurance why the Commission acted as it did. Section 14(1), 49 U.S.C.A.; *Alabama Great Southern R. Co.* v. *United States*, 340 U. S. 216; *Eastern-Central M. C. Ass'n.* v. *United States*, 321 U. S. 194,

211-212. The Commission report and the opinion of the District Court demonstrate on their face the Commission's conformity to that standard.

Underlying appellant's attack upon the unanimous decision of the three-judge court, the order of the entire Commission and the unanimous report and order of Division 3 of the Commission, is a steadfast refusal to recognize long-established legal principles which are controlling upon the narrow questions presented.

This is an investigation and suspension proceeding under Section 15(7) of the Commerce Act. It is not a complaint proceeding under Section 13 attacking any specific rates or ratings, nor is it a proceeding under Section 15(1) wherein the Commission institutes a general investigation resulting in the prescription of certain rates or ratings. The nature and extent of the administrative findings which are essential depend upon the statutory authority invoked and the context of the situation presented. *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 532.

The railroads filed tariffs which merely cancelled an entire basis of motor-competitive exceptions ratings to the full extent that they were applicable on any less-carload furniture and related articles moving via those railroads. Since the existing classification ratings were uniformly more favorable to the shipping public than the basis of maximum reasonable ratings already approved by the Commission in a nationwide proceeding, and since the entire level of basic class rates had been either prescribed or approved by the Commission in recent decisions,[4] the only substantive question presented by the suspended tariffs was whether the railroads should be compelled to continue in effect a depressed basis of ratings established to meet motor com-

[4] The last of these at the time of the hearing was *Increased Freight Rates, 1948*, 276 I.C.C. 9.

petition and to financially assist the furniture industry in a period of severe economic depression.

Supreme Court and Commission decisions made it clear that railroads may not be compelled to maintain lower than maximum reasonable rates in order to meet or cut under the rates of their competitors. *Texas & P. R. Co.* v. *United States*, 289 U.S. 627, 636; *Southern Class Rate Investigation*, 100 I.C.C. 513, 641-2. And in many cases over the years the Commission had consistently indicated general disapproval of competitive or other rate concessions for less-carload traffic below the regular basis of classification ratings, and had repeatedly stated that the railroads would not be required, against their judgment as to competitive and other special conditions, to make such concessions. *Tobacco Merchants Assn's* v. *Aberdeen & R. R. Co.*, 181 I. C. C. 199, 211; *Bananas From Gulf Ports*, 109 I. C. C. 211, 218.

The Commission was not required to suspend the tariffs cancelling the motor-competitive exceptions ratings, and no findings or decision would have had to be issued to support or explain such refusal. The purpose of the discretionary suspension power (limited by Section 15(1) to seven months) is to afford the possibility of a general review of tariffs to determine before their effectiveness whether they are just and reasonable, if an inquiry of that nature appears desirable or necessary. See *Interstate Commerce Commission* v. *I. Waterways Corp.*, 319 U. S. 671, 689-691.

Having accorded to protesting shippers the benefit of suspension and investigation, however, the ultimate Commission finding and the order withdrawing the suspension did not even then constitute a prescription or approval for the indefinite future of the level of each of the individual 367 classification ratings on less-carload furniture, or of the 151 classification ratings superseded by the lower excep-

tions ratings. The Commission's investigation necessarily dealt broadly with the entire basis of exceptions ratings and with the entire basis of classification ratings. Regardless of whether the principle of *Arizona Grocery Co.* v. *A. T. & S. F. Ry. Co.*, 284 U. S. 370, is applicable to an order in an investigation and suspension proceeding, as distinguished from an order in a complaint proceeding, it is indisputable that the individual classification ratings remain open to direct shipper attack in all respects for the future. If it be assumed (which we deny) that *Arizona Grocery* is applicable, the result would only be to bar a reparations award based upon evidence as to the fact situation existing when the Commission order in this proceeding was issued.

Considering the purpose of an investigation and suspension proceeding under Section 15(7) and the continuing availability of remedy through a complaint, under Section 13 of the Act, making specific attack upon any individual rating or ratings which may be thought unlawful, it would seem apparent that even most abbreviated findings in a Commission report would be adequate to support Commission orders which merely withdraw a suspension which the Commission could in its exclusive discretion have originally declined to issue without any findings or report. Considered in the light of the statutory authority exercised by the Commission and the context of the situation presented to the Commission, appellant's questions as to the adequacy of Commission findings are clearly not substantial.

1. The Question Whether the Commission Orders Are Invalid Because of Absence of Findings as to Rates Other Than on Furniture and as to General Rate Scales—Assigned Errors 6 and 7.

The Commission had before it testimony covering 712 pages of transcript, and 96 exhibits containing statistical and other data. The railroads presented in evidence the results of 14 special studies of less-carload furniture traffic, costs of service, loss and damage, cubic density, and value per pound. Size of shipments, length of haul, revenues per shipment, terminal and line-haul costs, traffic distribution and volume, motor truck ratings and rates, less-carload deficits, the financial condition of the furniture industry, the history of the classification ratings and of the exceptions ratings, the relationship between the present classification ratings and those approved by the Commission in a previous decision, and a great amount of testimony and data as to less-carload operations in general and for furniture traffic in particular were presented. The shipper protestants, including appellant, presented testimony and data on most of the same subjects. Division 3's report, consisting of 12 printed pages, includes concise discussion of the contentions of the parties, the findings made, the conclusions reached and the ultimate finding.

Appellant now says that the Commission's order is invalid because it is not based on findings or evidence comparing furniture rates under the classification ratings with rates on other commodities, and because the report contains no discussion of the general class rate scales.

As to the latter, it is apparent from the report that class rate levels were necessarily considered to the extent material in a case involving ratings, and are reflected in all findings relating to revenues, rate differences and deficits incurred by the railroads in handling less-carload furniture.

Only by application of the ratings to the class rates could those data have been produced.

The Commission's function in this proceeding was to reach an informed and expert judgment in this technical field on the basis of all the many competitive, traffic, revenue, cost, operating and historical facts before it. *Ayrshire Collieries Corp.* v. *United States*, 335 U. S. 573, 592-3; *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546.

The Commission decision reflects a composite of all the transportation facts adduced for the record after a most complete hearing. No rule of law makes any one element determinative, controlling upon the Commission, or essential. With a record even more comprehensive in subject matter than its own nationwide investigation of furniture rates and ratings (177 I. C. C. 5), the Commission was not disempowered to withdraw its suspension by reason of failure to include in its report a summary of non-furniture rates prescribed by it in other proceedings which were cited and discussed on brief and in oral argument by the parties to this proceeding. Appellant's argument that the order is invalid because of that failure does not raise a substantial question.

2. The Question Whether the Commission Orders Are Invalid Because of Their Effect upon Three Non-Furniture Classification Items—Assigned Errors 8, 9 and 10.

Among the 151 motor-competitive exceptions ratings cancelled by the suspended tariffs were three items which are known as articles "related" to furniture, rather than furniture itself. These articles are not shown among the 367 times in the Classification under the "Furniture and Furniture Parts" heading. They are shown under the headings "Vehicles Other Than Motor" (baby and doll car-

riages, gocarts and walkers), "Baskets or Hampers" (fiber and wood clothes hampers) and "Racks" (store display racks and stands). These three items are the subject of appellant's assigned errors 8, 9 and 10.

Before the District Court these three non-furniture items were the subject of plaintiff's Motion for Summary Judgment, which the court discussed in its opinion and denied in its judgment. Appellant does not now seek review of the court's action on the Motion.

As the District Court found (p. 44, Statement as to Jurisdiction), the railroads did present to the Commission statistical evidence showing the transportation similarity between the three non-furniture items and the general run of furniture items.[5] The court having found this evidence in the record, the question of whether it is really there (assigned error 10) is not of such substantiality as to justify extended consideration of these proceedings by the Supreme Court.

The fact that the three "related" items were accorded reduced exceptions ratings along with the non-furniture items is fully substantiated in the counter-affidavits before the District Court on the question of the Motion for Summary Judgment. If those affidavits are not in the record (assigned error 9) before the Supreme Court, the reason is solely that appellant does not now challenge the propriety of the court's denial of the motion and, thus, has not brought that portion of the record before the Supreme Court.

Assigned error 8 raises the question whether the Commission's order is invalid in its entirety because the Commission made no subsidiary findings specifically and separately dealing with the three non-furniture items. The

[5] In the record before the Commission, the data appears at p. 10 of Exhibit 1; pp. 3, 9, 10 and 23 of Exhibit 15; pp. 2 and 6 of Exhibit 17 and lines 1, 131, 132 and 133 of Exhibit 28. These exhibits are all included in Exhibit 1 of the record before the court.

court correctly found—and it is a well established principle—that in an investigation and suspension proceeding involving many individual rates applicable on many railroads it would manifestly be impossible, and is not legally required, to make specific findings as to each and every rate. *Assigned Car Cases*, 274 U. S. 564, 583; *United States* v. *Louisiana*, 209 U. S. 70, 75; *Georgia Commission* v. *United States*, 283 U. S. 765, 774; *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 82-83; *New England Divisions Case*, 261 U. S. 184, 197-99.

The Supreme Court has also held that an order covering many items, applicable over a wide expanse of territory, and made after protracted proceedings, should not be set aside even if (which we here deny) isolated portions should not have been included therein. *Georgia Commission* v. *United States*, 283 U. S. 765, 772. As in the *Inland Waterways* case, *supra*, the tariff schedules here involved were treated by the parties before the Commission on the theory that in this proceeding they should stand or fall in their entirety.

3. The Question Whether the Commission Admitted in Its Report That the Record Was Inadequate to Permit Subsidiary Findings Sufficient to Sustain Its Ultimate Conclusion—Assigned Error 14.

This extreme position is predicated on the Commission's statement in its conclusions (p. 36, Statement as to Jurisdiction) that the evidence relating to costs "is not conclusive." In the next sentence, however, the Commission went on to express its conviction that "the classification ratings proposed will not do more than compensate the respondents for the service performed on this traffic." When fairly read, and in conjunction with the specific cost findings (pp. 30-33) the Commission's final conclusion as to the

cost evidence is perfectly comprehensible and, without more, fully supports its order.

As the report shows, and as railroad cost and operating officers of long experience testified,[6] it is not yet reasonably possible to make a precise study of the cost of carrying one commodity in less-carload service. Railroad cost finding procedures have not yet attained that state of perfection or detail. The Commission would, therefore, have erred if it had said that the cost evidence was "conclusive." The Commission was realistic and accurate in stating that the cost data was "not conclusive." At the same time, however, considering the cost understatements described in the findings (p. 32) and giving proper effect to the findings as to operating expense levels for light density traffic such as furniture (p. 31), it was correct and proper for the Commission to be convinced, and to express its conviction, that the classification ratings would "not do more than compensate" the railroads for the service performed for this traffic.

An administrative report must fairly be read as a whole and particular sentences should not be taken out of context or considered hypercritically. *United States* v. *Pierce Auto Freight Lines, supra*, page 532. Yet this is what appellant does in asserting that the Commission admitted an inability to make adequate subsidiary findings. It is the Commission's duty to weigh all the evidence before it and, in the light of its experience and special knowledge in the transportation field, to reach decisions even in cases where the evidence may not be "conclusive." The fact that the Commission did this does not raise any substantial question justifying review by the Supreme Court.

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[6] Tr. 100, 135-36 in Exhibit 1 before the court.

4. The Question Whether the Commission Orders Are Invalid Because the Report Shows That the Wrong Rule as to Burden of Proof was Applied—Assigned Errors 15 and 16.

Appellant's Statement as to Jurisdiction indicates, at pages 9-11, that these assignments of error are intended to have relationship to the contentions that the tariff schedules violate Sections 2 and 3 of the Commerce Act. Appellant states that it made a *prima facie* case as to each type of unlawfulness, that the Commission made no subsidiary findings as to Section 2 and made only two legally erroneous findings as to Section 3.

Nothing in the Commission report indicates that the ultimate decision is based on failure of proof by either party, regardless of what party might have been regarded as having the burden of proof. Both the railroads and the shipper protestants offered comprehensive evidence on all issues. The Commission's findings are clearly predicated on the entire record. With hundreds of ratings involved, affecting traffic movements all over the country and on many railroads, it would obviously have been questionable for the Commission to find affirmatively, even on the extensive record before it, that *no* unjust discrimination or undue prejudice would occur as to *any* affected shipment. Such a finding could not have been helpful and, on the issues and record, it was unnecessary to the decision. Such a finding might have tended to prejudge the decision in a later complaint proceeding specifically attacking a particular rating on a particular shipment.

Appellant's present Section 2 argument (pp. 9-10, Statement as to Jurisdiction) was presented to the Hearing Examiner as an attack upon a graduated density table as the general basis for classification ratings. The findings

dispositive of that question are in the second full paragraph on page 518 of the Commission report (pp. 33-34, Statement as to Jurisdiction).

Before Division 3 appellant presented the same argument but under the new name of "relative unreasonableness." The Division apparently saw no necessity for dealing anew with the argument because of the different name under which it was presented. The entire Commission did not issue a new report after argument before it of the petition for reconsideration.

The grouping of furniture articles under classification headings reflecting densities and values for those articles, in spite of some overlapping as between groups, is a practical transportation and rate matter for the consideration of the Commission, not the courts. The Commission considered the matter in this proceeding and made appropriate findings.

The Section 3 findings are in no way inconsistent with existing decisions as to the legal significance of rate differences or the extent of carrier responsibility for their elimination. It is settled beyond question that the Commerce Act does not prohibit differences in rates and does not prohibit all discriminaitons or preferences; it only prohibits those which are undue, unjust or unreasonable. *Interstate Commerce Commission* v. *B. & O. R. R.*, 145 U. S. 263, 276; *Barringer & Co.* v. *United States*, 319 U. S. 1, 6, 13. Whether a difference in rates is unlawful is to be determined by application of "the transportation standard," which includes cost of service, value of service and other transportation conditions. *United States* v. *Illinois Central R. R.*, 263 U. S. 515, 521, 524. The lawfulness of cancelling reduced ratings established by Official Territory railroads to meet truck competition encountered by them at the time the exceptions were established does not depend upon contemporaneous action by carriers in other terri-

tories to meet a condition faced by Official Territory roads. The action of the Official Territory roads in this proceeding was uniform and non-discriminatory. These roads cancelled all reduced ratings on all items of less-carload furniture moving over their lines, regardless of origin or destination points.

Whether tariff schedules violate Section 3 of the Commerce Act is a question of fact within the exclusive jurisdiction of the Commission and the Commission report demonstrates a proper exercise of that jurisdiction.

5. The Question Whether the Commission Orders Are Invalid Because of the Statement of the District Court That Remedial Process Is Available to Shippers under the Commerce Act—Assigned Error 17.

Toward the conclusion of its opinion the District Court commented that "if some of the fears of unreasonableness, inequality or prejudice expressed by the shippers materialize, remedial process is readily at hand under the Act." (p. 47, Statement as to Jurisdiction). It is apparent that the correctness or incorrectness of that statement has no bearing upon the validity of the Commission orders.

Appellant asserts, however (p. 12, Statement as to Jurisdiction), that the statement is incorrect because of conflict with *Arizona Grocery Co.* v. *A. T. & S. F. Ry. Co., supra.* Regardless of the applicability of the *Arizona Grocery* principle, remedial process is indisputably available for the correction of any unreasonableness, undue prejudice or unjust discrimination which may exist with respect to any future traffic movement. The *Arizona Grocery* principle applies only to reparations orders awarding damage for shipments moving at the time of a previous Commission order.

The previous order involved in the *Arizona Grocery* case was issued in a complaint proceeding before the Commis-

sion attacking a specific rate on specific grounds of unlawfulness. That is quite different from the general order issued by the Commission in these investigation and suspension proceedings withdrawing its order suspending the tariffs cancelling reduced exceptions ratings on 151 items of traffic. The principle applicable in this proceeding is that expressed by Mr. Justice Jackson in the *Inland Waterways* case, *supra*. As in that proceeding, the present case was developed and considered before the Commission upon the theory that the tariff schedules must stand or fall in their entirety. Appellant's attack upon certain individual ratings, both before the Commission and before the District Court, was in support of an argument that the entire tariffs were unlawful. The Commission's withdrawal of its suspension of the tariffs did not convert each and every one of the 367—or of the 151—classification ratings into Commission-prescribed ratings, as distinguished from carrier-made ratings. For that reason, the individual classification ratings are still open even to retroactive attack in complaint proceedings under Section 13 of the Commerce Act, and are not immunized from such retroactive attack by the principle of the *Arizona Grocery* case. See the discussion and citations, particularly in footnote 21, in the *Inland Waterways* case, *supra*, at pages 685-687.

6. The Question Whether the Orders Are Invalid Because of a Failure to Make Subsidiary Findings Bridging a "Gap" Between the Findings Made and the Ultimate Conclusion.

Running through appellant's Statement as to Jurisdiction is reference (pp. 6, 7, 8, 15, 16) to an absence of "bridges" between the findings made and the ultimate conclusion of reasonableness of the suspended schedules, to a lack of findings which "could give validity" to the findings made,

and to a contention that the findings made are "meaningless."

The Commission's report itself reveals the lack of substance in appellant's illusion of a "gap" between the many findings made and the ultimate conclusion that cancellation of the reduced exceptions ratings was just and reasonable. The report specifically sets forth the graduated density table which is the general basis for the classification ratings and which in general governs the relationship between the 367 ratings on furniture articles of varying density, value, susceptibility to damage and other classification elements. Classification ratings for the individual items, on that basis and on various other bases, were before the Commission in exhibit form (Ex. 3) and typical portions thereof were reproduced in findings (p. 26, Statement as to Jurisdiction). The average revenue, cost, value, damage, traffic and other data for less-carload furniture as a class, and for the 151 specially-affected items, were addressed to the general questions of whether the basic density table was on a proper level for the highest and lowest ratings and whether there was economic justification and traffic necessity for cancellation of the competitive exceptions ratings. The conclusions expressed by the Commission under the heading "Conclusions" (p. 36) could hardly more clearly constitute a rational "bridge" between the many subsidiary findings and the ultimate conclusion.

Appellant's suggestion is essentially an argument that the Commission had a duty to spell out in detail all the mental processes employed, the experience and skill drawn upon, and the weight given to each item of evidence, in reasoning from specific findings to general conclusions and then to the ultimate conclusion.

The Commission doubtless could have done this, as it could also have made many additional but uncontrolling

findings and cited and discussed many recent Commission decisions (which were discussed before it on brief and in oral argument) as to the proper level of less-carload ratings for articles of various densities and values. But the failure to do these things establishes no error of law rendering the orders invalid.

The report plainly shows that the Commission reached its conclusion on the basis of the record, that its conclusion is sensible and that it considered the arguments and evidence on both sides of the controversy. Nothing more is required. *Alabama Great Southern R. Co.* v. *United States, supra.* Whether the Commission failed to do more than is legally required is not a substantial question for review by the Supreme Court.

Conclusion

The Commission report is rational and is based upon supporting data. The only issues in the proceeding were questions of "reasonableness," "unjust discrimination" and "undue prejudice"—all questions of fact within the exclusive jurisdiction of the Commission and calling for the exercise of informed and expert judgment in a technical field. The District Court did not err in dismissing the complaint attacking the Commission orders. The appeal attacking the District Court's judgment presents no substantial question.

The tariffs involved are now effective and have been so since May 8, 1951. Any specific ratings governing the freight charges on any particular furniture items may be directly attacked at any time by complaint filed with the Commission under Section 13 of the Commerce Act. The Commission orders here attacked merely withdrew the suspension of the tariffs, after the Commission's 7-month suspension power had been exhausted nearly three times. No

important public interest would be served by remanding this proceeding to the Commission for a further and more detailed report.

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24

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Supreme Court of the United States

OCTOBER TERM, 1951

No. 476

NATIONAL FURNITURE TRAFFIC CONFERENCE, INC.,

Appellant

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees

BRIEF ON BEHALF OF NATIONAL FURNITURE TRAFFIC CONFERENCE, INC., OPPOSING APPELLEES' MOTIONS TO AFFIRM

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INDEX

	Page
Statement of the Case	1
Argument	2
Point I	
The Railroad Respondents Misrepresent the Nature of the Issues Before the Commission	3
Point II	
The Commission Has Failed to Make the Subsidiary Findings Necessary to Sustain Its Ultimate Conclusion That the Ratings Proposed Were Just and Reasonable, in Conformity with Section 1 of the Act, and Had No Evidence Upon Which Such Findings Could Have Been Based, Even If They Had Been Made	7
A. *The Commission Has Admittedly Failed to Make Any Findings Based Upon Comparisons Between the Proposed Ratings and Those of Other Commodities Having Similar Transportation Characteristics, and Could Not Have Done So On the Basis of The Evidence of Record.*	8
B. *The Twenty-Year-Old, Stale and Discredited Furniture Opinion Cannot be Called Upon to Supply the Missing Comparative Findings and Evidence Herein.*	10
C. *No Valid Finding That the Proposed Ratings Will be No More Than Reasonably Remunerative Could Have Been Made by the Commission Herein, Nor Has Such a Finding Actually Been Made.*	12

PAGE

D. *The Subsidiary Findings Which the Commission Has Made Are Unrelated and Irrelevant to (and Are Clearly Not Such Typical or Representative Findings as Would Support) the Commission's Ultimate Conclusion That the New Ratings Do Not Violate Section 1 of the Act.* 15

POINT III

THE COMMISSION HAS MADE NO VALID FINDINGS IN SUPPORT OF ITS CONCLUSION THAT THE NEW SCHEDULES DO NOT VIOLATE SECTIONS 2 AND 3 OF THE ACT, AND COULD NOT HAVE MADE SUCH FINDINGS ON THE BASIS OF THE EVIDENCE OF RECORD. .. 18

A. *The Commission Has Not, and Could Not Have Made Any Findings to Overcome Appellant's Clear Showing That the New Ratings Will Result in Unjust Discrimination Violative of Section 2 of the Act.* .. 18

B. *In Support of Its Erroneous Conclusion That the Proposed Ratings Will Not Be Violative of Section 3 of the Act, the Commission Has Made Only Two Purported Findings, Which Are Contrary to the Evidence of Record and, In Addition, Are Improper As a Matter of Law.* 21

CONCLUSION 27

Supreme Court of the United States

OCTOBER TERM, 1951

No.

NATIONAL FURNITURE TRAFFIC CONFERENCE, INC.,

Appellant

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees

BRIEF ON BEHALF OF NATIONAL FURNITURE TRAFFIC CONFERENCE, INC., OPPOSING APPELLEES' MOTIONS TO AFFIRM

STATEMENT OF THE CASE

This is a direct appeal to the Supreme Court of the United States from a final judgment of a specially-constituted three-judge District Court in the District of Massachusetts (hereinafter called the District Court), which dismissed a complaint seeking to set aside certain orders of the Interstate Commerce Commission (hereinafter called the Commission). The judgment of the District Court was rendered

September 11, 1951. This appeal was allowed, a citation was issued, and the requisite appeal papers, including a Statement as to Jurisdiction, were filed with the Clerk of the District Court, on November 9, 1951. Appellees United States of America and Interstate Commerce Commission served upon appellant's counsel, on November 21, 1951, a copy of their Motion to Affirm, and appellees The Pennsylvania Railroad Co. and the other interveners as parties defendant in the proceeding below served upon appellant's counsel, on or about November 23, 1951, a copy of their Motion to Affirm.

This brief is filed by appellant in the Supreme Court of the United States pursuant to Rules 7 (3) and 12 (3) of the Revised Rules of the Supreme Court of the United States, in opposition to both of the aforesaid motions.

ARGUMENT

The appellant's Statement as to Jurisdiction sets forth the reasons why the issues raised by this appeal are substantial, and such reasons need not be restated herein. However, the picture painted by appellees in their respective motions is factually incorrect, legally erroneous and, in its overall effect, thoroughly misleading. Moreover, appellees' insistence that the numerous defects in the report and orders of the Commission and in the record upon which said report and orders are based may be cavalierly brushed aside as unimportant and insubstantial, and their further insistence upon obscuring appellant's simple, relevant and substantial arguments with a smoke scree. of denials and of refutations of hypothetical issu

and arguments never raised or advanced by appellant, call for a further, clarifying statement of appellant's position in this case and of the flagrant and substantial errors of law, which, in appellant's opinion, will cause this Court, after full consideration of the case upon its merits, to reverse the Commission's orders, and the District Court's judgment affirming such orders.

POINT I

The Railroad Respondents Misrepresent the Nature of the Issues Before the Commission.

Convincing proof of the merit of the appellant's appeal in this proceeding is afforded by the railroad respondents' endeavor to becloud the nature of the issue before the Commission. These respondents recognize the basic inadequacy of the Commission's report, which inadequacy flowed (as is pointed out hereinafter and in the Statement as to Jurisdiction) from the failure on the part of the railroad respondents themselves to sustain the burden of proof imposed upon them by statute. They further recognize that the manner in which the District Court supported the Commission's decision is indefensible. That Court, awed by the "expertise" of the Commission, merely "assumed" that the Commission must have had "in mind" facts concerning the general rate structure which would lend support to its ultimate conclusion, and the railroads are well aware that the Commission's report cannot be permitted to stand on that basis. Being unable to support the Commission's decision in accordance with recognized principles of judicial review and having

available from the District Court only an untenable decision, the railroads, in desperation, assert to this Court that the issue before the Commission was not whether the proposed new ratings were lawful (which the Commission and the District Court both recognized to be the issue) but merely whether cancellation of the old ratings was lawful and, alternatively, that the issue before the Commission was merely whether withdrawal of the suspension order was proper. The railroads have not even yet determined definitely as between these two assertions. Thus, at one point in their Motion to Affirm, the railroad respondents purport to state the sole issue before the Commission as follows:

> "This single issue was: Was it 'just and reasonable,' or unlawful, for the railroad respondents to cancel the special basis of motor-competitive exceptions ratings on all items of less-carload furniture and related articles then enjoying such reduced ratings?"

They then point to findings which they contend to be adequate to support a determination favorable to them on this issue. A few pages later in their motion, however, the railroad respondents assert that the issue before the Commission was merely whether the Commission should withdraw its suspension orders, and, in this regard, the railroads say:

> ". . . it would seem apparent that even most abbreviated findings in a Commission report would be adequate to support Commission orders which merely withdraw a suspension which the Commission could in its exclusive discretion have originally declined to issue without any findings or report."

The railroads' purported analysis of the issues before the Commission and their statements as to what the Commission decided are, of course, patently unsound, and the carriers' recognition of this is shown by their efforts to justify the classification ratings. If there were any merit in the assertion of the railroad respondents that the Commission had approved only cancellation of the exception ratings or had merely ordered withdrawal of its suspension orders and had not approved the classification ratings, then the Commission's report would obviously be invalid for want of even an appropriate "ultimate finding". Section 15 (7) of the Interstate Commerce Act* (hereinafter called the Act) expressly requires that, in investigation and suspension proceedings, the *new rates or ratings* must be approved or disapproved as just and reasonable, and, if the Commission had not acted with reference to the new ratings, it obviously would have had no authority to enter a final order. The contention has never heretofore been advanced, we believe, that a carrier could satisfy the requirements of Section 15 (7) merely by showing the inappropriateness of the existing rates proposed to be canceled. The most which has heretofore been contended is that a carrier might show that the *amount* of a proposed increase was justified without a showing that the increased *rate itself* was justified. But even this claim was early rejected. As Professor Sharfman points out, after noting that the British Railway and Canal Act of 1894 required carriers merely to justify proposed

*24 Stat. 379, as amended, Title 49, United States Code, Section 15(7).

increases in their rates as distinguished from the proposed new rates themselves,

> "Under the American statute, on the other hand, there was no such recognition of the reasonableness of existing rates, and the burden of proof was expressly made applicable to 'the increased rate.'" Sharfman, *The Interstate Commerce Commission*, Part III B, pp. 35-36 (1936),

and as the Commission itself said, in *Advances In Rates—Western Case*, 20 I. C. C. 307, 316 (1911),

> "The assumption of the law is that the railroad which increases its rates takes such action knowing that the law casts upon it — if challenge is made either by this Commission or otherwise — the burden of justifying its action. Theirs . . . is 'the risk of non-persuasion' . . . The railroad must assume to prove to this Commission *that the new and increased rates are within the words of description and limitation used in the act;* that is, that, *they are just and reasonable.*" (Emphasis supplied.)

If the Commission's ultimate findings of justness and reasonableness were confined to the cancellation tariffs—and were held not to apply to the new, and much higher, classification ratings on which the carriers will base their charges—it would be obvious, *without any further analysis whatsoever,* that the statute had been completely ignored.

If the railroads are to be taken as seriously believing that the Commission had before it only the issue of whether cancellation was justified or the issue of whether withdrawal of the suspension might be appropriate, and not the issue of reasonableness of the classification ratings, the dearth of appropriate evidence—and the consequent lack of appropriate

findings in this case—which appellant points out hereinafter and in its Statement as to Jurisdiction, would be easily explained. Obviously, if the carriers tried their case before the Commission on the wrong theory—believing it unnecessary to justify the new ratings—it is understandable that they would not offer the types of evidence which we have noted is essential in justifying proposed ratings, and it is also understandable that they would not attempt to relate their cost and other evidence to the new ratings.

POINT II

The Commission Has Failed to Make the Subsidiary Findings Necessary to Sustain its Ultimate Conclusion that the Ratings Proposed Were Just and Reasonable, In Conformity With Section 1 of the Act, and Had No Evidence Upon Which Such Findings Could Have Been Based, Even If They Had Been Made.

In determining the reasonableness of new ratings or rates, comparisons with other and existing ratings or rates applicable to commodities having similar transportation characteristics are the essentials of the normal method. No such comparative findings were made in this case, and none could have been made on the basis of the evidence of record. Moreover, the twenty-year-old discredited decision of the Commission in *Furniture*, 177 I. C. C. 5 (1931) cannot be called upon to supply the findings and evidence missing from this report and record.

In the absence of comparisons, findings to the effect that the ratings proposed are no more than reasonably compensatory, based upon adequate evidence as to the cost of, and the revenues reasonably to be expected from, the services rendered, also might

have established the justness and reasonableness (under Section 1) of the proposed ratings. Yet no such valid finding was made by the Commission herein, and the record is totally devoid of any *revenue* evidence upon which such a remuneration finding could have been based.

Absent both of these crucial types of findings, the fragmentary and unrelated findings contained in the Commission's report are not, without more, relevant to, and do not support, the Commission's ultimate conclusion that the proposed schedules "are just and reasonable and not otherwise unlawful."

A. *The Commission Has Admittedly Failed to Make Any Findings Based Upon Comparisons Between the Proposed Ratings and Those of Other Commodities Having Similar Transportation Characteristics, and Could Not Have Done So On the Basis Of The Evidence Of Record.*

Customarily, the justness and reasonableness under Section 1 of the Act of new ratings or rates is proved by evidence that such ratings or rates are similar to those applicable to other commodities which have comparable transportation characteristics. If the ratings or rates of such other commodities have been prescribed by the Commission, or have been in effect for a reasonable period of time, so that they may be presumed to be just and reasonable, such comparisons tend to prove, at least *prima facie*, that the proposed new ratings or rates are also just and reasonable. But as appellant has argued before the District Court (and appellees admit), no findings based upon such comparisons were made

by the Commission; nor could they have been made upon the record herein.

Railroad appellees admit the absence of these requisite findings, but imply in their Motion to Affirm that comparisons with non-furniture rates prescribed in other proceedings are contained in the record and were in fact considered by the Commission, though reference thereto was omitted from its report. The only "evidence" which the railroads could conceivably have reference to were a few lines of testimony enumerating six commodities for which the Commission had, at one time or another, upheld ratings approximately as high as the new less-carload furniture ratings, including such highly fragile and non-comparable items as ice cream cones, dishes and neon electric signs whose different transportation characteristics are obvious at first glance. It was clearly proper for the Commission to ignore this meaningless and irrelevant testimony, as it did, if only for the reason that the weight characteristics of the ice cream cones and other items were shown to be quite different than those in the density table upon which the furniture ratings purport to be based.

Moreover, the guessing game which appellees seriously urge this Court to engage in as to the evidence relied upon by the Commission in support of its ultimate conclusions, points up better than any argument which appellant could advance the function of, and necessity for, subsidiary findings disclosing clearly the basis of the Commission's action. The short answer to appellees' foregoing contention is that, as they admit, the requisite comparative findings are lacking, and it is not a judicial function to make

such findings for the Commission. This Court must not be led, out of a desire to uphold an administrative decision, to sustain the decision by supplying findings which the Commission failed to make, and which it would not and could not have made on the basis of this record.

The District Court dealt with the absence of the comparative findings and evidence normally required in cases such as this by stating that—

> "we must assume that in these cases the Commission has the general rate scale in mind for comparative purposes when setting or sanctioning a rate for any particular commodity."

By thus assuming that the Commission must have done everything it ought to have done, the District Court once again demonstrated its general disposition to regard the administrative process as a mysterious but infallible rite, as to which it must abdicate usually essential and well-established methods and principles of judicial review. The question whether or not it has erred in so doing is of vital importance to the shippers represented by appellant herein.

B. *The Twenty-Year-Old, Stale and Discredited Furniture Opinion Cannot be Called Upon to Supply the Missing Comparative Findings and Evidence Herein.*

Even the District Court, in refusing the relief prayed for by appellant, completely ignored appellees' attempt to use the twenty-year-old opinion of the Commission in the *Furniture* case (*Furniture*, 177 I. C. C. 5) as a cure-all for the defects in the Commission's report and in the record, for the obvious

reason that it has no relevance whatsoever to the instant proceeding. Nevertheless appellees advert to this opinion repeatedly in their Motions to Affirm, implying again that if their evidence before the Commission falls short of proving the new ratings just and reasonable, then the fact that they are substantially similar to the ratings approved by the Commission in the 1931 *Furniture* case automatically establishes the lawfulness of the new schedules.

Appellants believe that this unmeritorious contention is answered adequately on pages 8-9 of the Statement as to Jurisdiction. As therein pointed out, the ratings prescribed in the old *Furniture* case were permitted to become effective for a period of only a month or two twenty years ago and were immediately recognized as unsound by everyone affected thereby. The Commission agreed to reopen the proceeding and reconsider its order. Although the proceeding was ultimately closed without rehearing, this action was taken by the Commission upon the shippers' request, only after the carriers had agreed not to apply the unrealistic and prohibitively high ratings originally recommended, but to substitute therefor the exception schedules whose cancellation gave rise to the instant proceeding. Moreover, even if the obsolete *Furniture* decision had been considered sound in 1931 (which it was not), it could not now be accorded weight in a proceeding between different parties and after a lapse of more than twenty years, during which the rates applicable to these ratings have been vastly increased and during which packing requirements have been materially changed in such a way as to make the traffic far more attractive to the carriers from the standpoint of density and

risk of damage, but far more expensive per unit for the shippers to ship.

The Commission must make its determinations on the basis of the record before it in this proceeding, and not on the basis of one which is twenty years old, and to which appellant was not even a party. See *The Chicago Junction Case*, 264 U. S. 258, 263; *United States* v. *Abilene & Southern Railway Co.*, 265 U. S. 274. Reliance by the Commission upon its decisions in other cases to bolster a deficient record was expressly disapproved in *Erie Railroad Co.* v. *United States*, 59 F. Supp. 751 (S. D. Ohio 1944), wherein the Court said—

> ". . . no evidence was introduced which tends to establish the unreasonableness of the rates . . . but on the basis of its decisions in other cases, it (the Commission) held that the rates were unreasonable. *This constituted prejudicial error.*" (Emphasis supplied.)

Clearly appellees' last-ditch attempt to resurrect, in their Motions to Affirm, the stale and obsolete *Furniture* decision as a prop for their unsupportable position in this case must fail here, as it did even before the District Court.

C. *No Valid Finding That the Proposed Ratings Will be No More Than Reasonably Remunerative Could Have Been Made by the Commission Herein, Nor Has Such a Finding Actually Been Made.*

A valid finding that the ratings proposed would result in rates no more than reasonably remunerative might have adequately supported the Commission's conclusion that the proposed schedules are just and

reasonable under Section 1, provided that such finding were made and were supported by substantial evidence. No such finding, however, could have been made by the Commission on the record before it, nor has such a finding actually been made.

The following statement by the Commission in its report herein is pointed to by appellees as supplying such a finding:

> "The evidence relating to costs is not conclusive, but it gives rise to serious doubt as to whether sufficient revenue is derived *from the exceptions basis* to compensate for the cost of the service. From the evidence before us, we are convinced that the *classification ratings proposed* will not do more than compensate the respondents for the service performed on this traffic." (Emphasis supplied.)

If the second of these two sentences could be divorced from the confusion of inability-to-find which is implicit in the first sentence, and such second sentence could be deemed a finding of remunerativeness, the "finding" would have to be stricken for want of support in the evidence. Remunerativeness imports a comparison of cost or outgo, on the one hand, with revenue or income, on the other hand. Unless data with respect to both estimated costs and estimated revenues are available, it is impossible to say whether given rates will be remunerative or, if remunerative, how remunerative. Although it is admitted that cost data were submitted for the Commission's consideration in this case (and the only issue in that regard is whether the Commission has not rejected such evidence as wholly inconclusive),

no one has suggested that the Commission heard any evidence which would indicate the extent of the revenues reasonably to be derived from the new classification ratings. The railroad respondents do not assert that any such revenue evidence was offered, and the District Court conceded that none was, when it sought to excuse the omission on the ground that no one could predict "accurately" the amount of traffic which would move upon the new ratings. In the absence of such revenue evidence, the Commission obviously was no more in a position to make findings concerning remunerativeness than is a businessman, having only an idea what his *expenses* will be, to estimate his *profits*.

While the sentence upon which the railroad respondents thus rely (the second of the sentences last above quoted) is, if a finding at all, a completely unsupportable finding, the fact of the matter is that the sentence itself may not properly be deemed to be a finding. The Commission's statement of its conclusions with respect to the carriers' prospective profits under the new schedule, considered as a whole, clearly indicates the Commission's dissatisfaction with the cost evidence and its inability to make even a *costs* finding bearing upon the issue of remunerativeness. When the Commission can derive no more than "serious doubt" as to the inadequacy of *existing* schedules in compensating the carriers for their costs, it seems incredible that nevertheless that same record could "convince" the Commission that *new ratings* which, as it has found, are on the average

from 58.7% to 76.3% higher than the existing ratings, will do no more than fairly compensate* the carriers.

D. *The Subsidiary Findings Which the Commission Has Made Are Unrelated and Irrelevant to (and Are Clearly Not Such Typical or Representative Findings as Would Support) the Commission's Ultimate Conclusion That the New Ratings Do Not Violate Section 1 of the Act.*

In attempted refutation of appellant's claim that the aforementioned crucial subsidiary findings are lacking in the Commission's report, and could not have been made on the basis of the record before the Commission, the District Court stated in its opinion:

> "Well over a dozen subsidiary findings were made (by the Commission) covering the nature, organization, and extent of the furniture industry; the volume and character of its traffic, and the extent to which it moves by truck, and the average length of haul when so moved and when moved by rail in less than carload lots. Findings also were made with respect to the transportation characteristics of furniture, i.e. its weight, density, value, susceptibility to damage, terminal handling costs, and its desirability generally as traffic."

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*In order to consider the Commission's report in the light most favorable to its validity — and not hypercritically as appellees allege — the word "fairly" has been interpolated in the Commission's said finding. Without such interpolation, the finding that the new schedules "compensate the respondents for the service performed" is meaningless. Actually, appellant believes that the Commission purposely omitted the word which might have given meaning to this finding, because it knew that it was impossible to make such a meaningful finding on the record.

By thus being lulled into complacent recital of these findings, without thought as to their possible relationship or non-relationship to the Commission's ultimate conclusion, the District Court fell victim to the carriers' effort at all stages of this proceeding to conceal the essential weakness of their case behind a barrage of voluminous and quantitatively impressive evidence, which caused the District Court to give up in despair by saying that—

> "To analyze the record in detail and to discuss all of the arguments made with respect to it, would result in an opinion as long as the Book of Deuteronomy and as instructive and palatable reading as the 'begat' chapters of the Book of Numbers."

But a purposely cumbersome and unnecessarily huge record should not be allowed successfully to camouflage administrative laxity, nor to place Commission action based upon such a record beyond effective review by the courts. The Commission makes no findings based upon comparisons and had no evidence supportive of such findings, so that the subsidiary findings referred to by the District Court cannot be deemed the basis for the customary comparisons with other, similar commodities. So far as concerns remunerativeness, it is clear that whether proposed increased freight rates are remunerative or not cannot be proved unless evidence of the reasonably anticipated cost to the carriers of rendering the service in question is compared with the revenue which the carriers may reasonably be expected to receive therefrom. It would seem to be almost too clear to warrant extended discussion that the alleged findings summarized by the District Court in the

passage hereinbefore quoted (wherein revenues are, of course, never mentioned), and evidence supportive of such findings, have no bearing at all on the Commission's conclusion (if such it be) that the new ratings will do no more than fairly compensate the carriers for the service performed. Nor, of course, do such findings provide any indication that the Commission (although it makes no mention thereof) might have been guided by comparative considerations.

As a further part of the general smoke screen thrown up by the carriers to hide the legal insufficiency of their case, appellees attempt to make it appear in their motion as though appellant's case before this Court is grounded in large part upon the argument that the carriers should have proved affirmatively before the Commission the justice and reasonableness of each and every one of the 151 ratings which were to be increased. Obviously, appellant makes no such unreasonable contention and is in complete agreement with the statement of the District Court herein that—

> "typical or representative findings resting upon typical or representative evidence are all that is required . . ."

Appellant's contention is simply that there are, in the Commission's report, as hereinbefore pointed out, no legally sufficient findings whatsoever—typical, representative or otherwise—either with respect to furniture generally or with respect to the aggregate group of 151 items whose ratings were being increased or even with respect to a single one of those 151 items (let alone a representative cross-section thereof), and that there was in the record before the

Commission, as hereinbefore pointed out, no evidence upon which any such legally sufficient findings might have been based.

POINT III

The Commission Has Made No Valid Findings in Support of Its Conclusion that the New Schedules Do Not Violate Sections 2 and 3 of the Act, and Could Not Have Made Such Findings on the Basis of the Evidence of Record.

The Commission's ultimate conclusion was that the suspended schedules were "just and reasonable" (i. e., do not violate Section 1 of the Act), "and not otherwise unlawful", which is a finding that they also do not violate Sections 2 and 3 of the Act.

A. *The Commission Has Not, and Could Not Have Made Any Findings to Overcome Appellant's Clear Showing That the New Ratings Will Result in Unjust Discrimination Violative of Section 2 of the Act.*

Appellant called to the District Court's attention the fact that the Commission's report is totally devoid of any findings whatsoever with reference to Section 2. Appellees admit that the Commission made no such findings and could not have made them upon the record before it, but claim that these findings were unnecessary because

> "The grouping of furniture articles under classification headings reflecting densities and values for those articles in spite of some overlapping as between groups, is a practical transportation and rate matter for the consideration of the Commission, not the courts."

Thus once again appellees attempt to defend the Commission's decision in their favor by hiding its defects behind the cloak of administrative expertise.

As appellant has pointed out in its Statement as to Jurisdiction, *the carriers* had the burden of proving that the proposed new ratings *will not create* unjustly discriminatory rate relationships. *Appellant* made a strong, *prima facie* case before the Commission showing that the new ratings will create a multitude of such unlawfully discriminatory relationships, and this showing stands unrefuted by any evidence of appellees. For example, the shippers pointed out that, under the classification ratings, *identical items of furniture* carry different ratings and consequently pay different rates *depending upon their intended use* (Tr. 637), and also that many items of furniture, so substantially similar as to be entitled to equal treatment pursuant to Section 2, are assigned different ratings and, accordingly, afforded unequal treatment (Tr. 635). The impropriety of such practices is clear. As Professor Sharfman points out in his aforementioned treatise,

> "Use as such has been consistently deemed irrelevant as a rate factor; indeed . . . the imposition of different rates on the same commodity with respect to its different uses has been repeatedly condemned as violating the principle of equality." (P. 486)

and, as the Commission said, in *Western Classification Case*, 25 I. C. C. 442, 499 (1912),

> "Transportation charges may not be properly predicated upon the use to be made of an article offered for transportation."

So also, Section 2 is well and clearly understood to prohibit discrimination as between like commodities,

whether or not identical. As this Court said, in *Texas & Pacific Railway Co.* v. *Interstate Commerce Commission,* 162 U. S. 197,

> "The term 'a like kind of traffic' as it occurs in Section 2 of the Act to regulate commerce, and as used in this report and opinion, does not mean traffic that is identical, but it means traffic that is of 'a like kind' with other freight in the elements of a fair and just classification for the purpose of arriving at a just and reasonable rate and a rate that will avoid unjust discrimination and unlawful preference."

See also *Douglas & Co.* v. *Illinois Central R. Co.*, 31 I. C. C. 593 (1914).

Moreover, there is no question concerning the facts. The carriers do not deny that, as an illustration, the item of furniture shown on Sheet 1 of Exhibit 92 may be sold as a desk, in which event it would move on a one and one-half times first class rate or may be sold as a vanity base, in which event it would move on the first class rate. There is also an abundance of undisputed evidence showing that highly similar articles take wholly different ratings. To illustrate, Exhibit 92 shows a lamp table and a straight chair virtually identical in design and construction, and with practically the same density and value characteristics being assigned to first class and double first class, respectively. Another comparative illustration in the same exhibit shows a wing chair and a sofa, obviously "like kinds of traffic", assigned ratings of double first class and one and one-half times first class, respectively. The height of absurdity and unjust discrimination is revealed on still another page of the exhibit (page 4) wherein it is shown that an overstuffed sofa is assigned a first class rating,

whereas its *matching counterpart*, an overstuffed chair, must be charged one and three-quarters times such first class rate, notwithstanding the fact that the two pieces have virtually the same density and value characteristics and obviously are identical in all transportation characteristics relating to movement and handling, since they almost invariably are sold and shipped in sets. Moreover, as Witness Bohman pointed out, these illustrations are merely typical; instances of similar unjust discrimination are myriad (Tr. 636).

Notwithstanding the importance of this Section 2 issue, however, the Commission's report is completely silent as to its reasons for ignoring the shippers' strong and undisputed *prima facie* showing in the matter.

B. *In Support of Its Erroneous Conclusion That the Proposed Ratings Will Not Be Violative of Section 3 of the Act, the Commission Has Made Only Two Purported Findings, Which Are Contrary to the Evidence of Record and, In Addition, Are Improper As a Matter of Law.*

The Commission has mentioned the shippers' contention that the proposed new ratings will result in undue preference and prejudice, in violation of Section 3 (1) of the Act, in only two sentences of its report. If these are the subsidiary findings relied upon by the Commission in support of its ultimate conclusion as to Section 3 compliance (and there are no others on which it could rely), the Commission has clearly failed to make the findings necessary to overcome the shippers' *prima facie* case of unlawfulness.

To establish their *prima facie* case of Section 3 violation, the shippers pointed out that, in many instances, following establishment of the new high classification ratings within Official Territory and on interterritorial shipments to and from Official Territory, particular shippers would be placed at a substantial rate disadvantage in attempting to compete with other shippers shipping their freight under similar circumstances, and also pointed out that the same carrier or carriers would be parties to the arrangement giving rise to such unequal treatment. To illustrate, a shipper in Gardner, Massachusetts is clearly prejudiced if he pays higher freight charges to reach a market in the South, such as Atlanta, Georgia, than the railroads in the South charge a Southern manufacturer whose goods must move the same distance to reach Atlanta.* If the Southern Railway is the carrier for the Southern producer and also participates, with its connections, in the haul from Gardner to Atlanta, the Southern Railway is clearly a participant in the improper arrangement, and could cease to be so by either withdrawing its concurrence to the high rates from Gardner or increasing its rate from the southern point.

In dealing with the shippers' contentions relative to the Section 3 unlawfulness which is thus inherent

*In the Commission's recent decision in the *Class Rate Case*, (262 I. C. C. 447 (1945)) the Commission held that differences in transportation conditions in Official Territory, Southern Territory and Southwestern and Western Trunk-Line Territories were not sufficiently great to warrant differences in mile-for-mile class rates.

in the new ratings, the Commission makes only two purported findings, namely, the negative finding that,

> "As stated, the record is not persuasive that the ratings proposed will subject any shippers to undue prejudice."

and the obscure, as well as wholly unwarranted, finding that,

> "There is no indication of competition, with effective control of the rates by a carrier or carriers, which could constitute support for a finding that ratings as proposed would subject shippers to undue prejudice."

The first of these purported findings is, as hereinbefore pointed out, cast in language which would indicate that the Commission had overlooked the fact that, once the issue of undue prejudice has been properly raised, as it clearly has in this instance, the burden of being persuasive is on the carriers. This finding is accordingly wrong as a matter of law and meaningless in the context of this case.

The second purported finding is also clearly erroneous as a matter of law. Thus, the confusing conclusion that there is "no indication of competition, with effective control of the rates by a carrier or carriers" could not conceivably mean that there was an insufficient showing of competition between furniture markets and producing areas in Official Territory and those in other territories, in view of the Commission's own findings, as set forth in its report herein, with respect to the furniture industry in general, its peculiar makeup and geographic distribution, its nationwide marketing and the importance of

interterritorial furniture traffic. Moreover, such an interpretation of the Commission's obscure finding is precluded by the evidentiary standards which the Commission itself has heretofore established with respect to showing of competition. Thus, it stated in *Acme Mills* v. *A. G. S. Ry. Co.*, 136 I. C. C. 114 (1927),

> "The evidence presented, as already indicated, consists very largely of rate comparisons showing the maladjustments above mentioned, and there is only meagre evidence of record with respect to the competition which exists between the complainant merchants and manufacturers and those at the points alleged to be preferred, or with respect to the specific effect of the maladjustments upon complainants. ***But the manifest purpose of Section 3 will not be served if it is given an interpretation narrower than the broad and comprehensive language justifies.*** Whatever may be the case with respect to reparation for what has happened in the past, *no good reason appears, so far as the future is concerned, why we should permit cases of maladjustments of rates* which at all events threaten injury, *to continue until specific and detailed evidence of actual injury is presented* at great labor and expense to the injured parties." (Pp. 118-119) (Emphasis supplied.)

A more probable interpretation of the Commission's last-mentioned purported finding (though one which, in appellant's opinion, is erroneous) is that the Commission thought that the requirement under Section 3(1) of the Act that there be effective control both of the preferential and the prejudicial rates was lacking in this case. Appellant objects to this conclusion (if such it is) as plainly wrong as a matter of law.

In the recent case of *Ayrshire Collieries Corp.* v. *United States*, 335 U. S. 573 (1948), this Court

affirmed a finding by the Commission that the Milwaukee and Illinois Central Railroads were violating both Section 2 and Section 3 of the Act in a factual situation described by the Court, as follows:

> "The Milwaukee and Illinois Central were granting more favorable rates to some origins than to others in the same groups or districts. Their single-line rates from mines on their own lines were much lower than joint-line rates from other mines in the same group to the same destinations. The latter are rates published by other carriers and in which Milwaukee and Illinois Central join. Milwaukee and Illinois Central therefore are parties to an arrangement which results in some mines getting lower rates than other mines in the same group on shipments to the same destination."

The fact is undisputed that many southern and western cities are important furniture markets, and that Official Territory producers must, in order to compete in such markets, use the southern and western railroads, which maintain low exceptions ratings for southern and western producers, but join with the Official Territory carriers in publishing the high classification ratings for Official Territory producers. Appellant submits that the principle of the *Ayrshire Collieries* case, supra, is therefore also governing in this case, and the Commission's conclusion that there is "no indication" of effective control of the rates by a carrier or carriers is plainly unwarranted.

However, if this Court were to determine (contrary to appellant's foregoing contention) that *Ayrshire Collieries* is not applicable here, then the instant case would seem to raise squarely the important question of law which this Court expressly left un-

decided in the *Class Rate Case**, so called. In that case, the Court described what is essentially also appellant's argument in this case as follows:

> ". . . it is said that carriers in Official Territory control rates within that area, and also control, jointly with the carriers in each of the other Territories, the rates from each of them into Official. That common source of discrimination is said to be sufficient to sustain the Commission's action. See *St. Louis S. W. R. Co.* v. *United States*, 245 U. S. 136, 62 L. Ed. 199, 38 S. Ct. 49; *Chicago I. & L. R. Co.* v. *United Staes*, 270 U. S. 287, 70 L. Ed. 590, 46 S. Ct. 226. *But we do not need to decide the question.*" **(Emphasis supplied.)**

The conditions which appellant contends are violative of Section 3 in the instant case are almost precisely those described by the Court in the aforesaid quotation, and the legal conclusions which, in appellant's opinion, follow therefrom, are identical with those advocated in the quoted argument. As hereinbefore set forth, Southern Territory carriers, for example, control the rates within their territory, and also control jointly with Official Territory carriers the interterritorial rates between Southern and Official Territories. Preference and prejudice result from the fact that the intraterritorial rates remain at the old level, while the interterritorial rates have risen drastically as a result of the Commission's orders herein challenged. In appellant's view, this creates an unlawful rate relationship violative of Section 3 of the Act. The requisite "common source of discrimination" (which is probably the same element as that considered lacking by the Commission when it found "no indication" of "effective control")

**New York et al* v. *United States et al*, 331 U. S. 284, 342 (1947).

is found in the instant case — as in the argument quoted above from the *Class Rate Case* — in the common control of both rates by Southern Territory carriers.

Irrespective of whether the instant case is governed by the rule of *Ayrshire Collieries* or raises the foregoing problem left open for future decision in the *Class Rate Case*, at least one point should be clear beyond all doubt from the foregoing discussion, namely, that the question whether the Commission's orders herein are violative of Section 3 of the Act presents substantial and important issues of law, and not, as the railroad appellees attempt to persuade this Court, purely

> "a question of fact within the exclusive jurisdiction of the Commission."

This patently misleading statement once again furnishes an example of appellees' frantic efforts, throughout these proceedings, to prevent at all costs thorough judicial review of the decisions of the Commission and the District Court herein. They know that such a review by this Court can only result in reversal of the unsound and legally insufficient decisions below.

CONCLUSION

For the foregoing reasons, appellant submits that this appeal raises substantial questions concerning the propriety and lawfulness of arbitrary, unsupportable and patently deficient action by the Interstate Commerce Commission. These are important questions of law, which lie far beyond the scope of the Commission's "exclusive jurisdiction" and "admini-

strative expertise", and which are properly and of necessity subject to judicial scrutiny and review. Appellees' motions to affirm should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing brief upon counsel for the adverse parties in this proceeding by causing a copy thereof to be mailed, postage prepaid, to each of said counsel.

Dated this 11th day of December, 1951, at Boston, Massachusetts.

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